No. 15886.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DIXIE TANK & BRIDGE CO., a corporation,

Appellant,

vs.

COUNTY OF ORANGE, a County of the State of California, and WILLIS H. WARNER,

Appellees.

BRIEF FOR APPELLEES.

JOEL E. OGLE,
County Counsel,
STEPHEN K. TAMURA,
Assistant County Counsel,
and
ADRIAN KUYPER,
Assistant County Counsel,
308 Hall of Records,
Santa Ana, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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1. Statement of the Case.

The events upon which the Second Amended Complaint was attempted to be founded arose out of work done by the plaintiff-appellant on a high-water tank located on the grounds of the Orange County General Hospital in the fall of 1956. As shown by the Minute Order of the Board of Supervisors of the County of Orange, dated August 28, 1956 [part of Ex. "E," R. 31], the original estimate of the job was $6,500.00. There is no allegation that this estimate was ever less than this amount. The estimated cost was increased on November 7, 1956, by the amount of $1,011.60 [R. 32] making a total bill of $7,511.60, which is the amount finally billed and the amount prayed for in the Second Amended Complaint [R. 45].

No advertising for bids ever took place regarding this job nor was there any adoption of plans or specifications or strain sheets. None is alleged in the Complaint [R. 58-74] or in the affidavit of Mr. Riley, president of appellant [R. 128-134]. Such action is denied by the answer [R. 92-93] and by the uncontradicted affidavit of Mrs. Graham, Assistant Purchasing Agent of appellee [R. 55-56].

Both plaintiff-appellant and defendants-appellees moved for judgment on the pleadings in the trial court, and judgment thereon in favor of defendants was made and entered [R. 164-166].

Plaintiff-appellant appeals.

2. Argument.

The Government Code of the State of California, by its Section 25450 provides,

> "whenever the *estimated* cost of any construction of any . . . public building or the cost of any repairs thereto exceeds the sum of $4,000.00 . . . the work shall be done by contract. Any such contract not let pursuant to this article is *void.*" (Emphasis added.)

The article referred to requires advertising for bids and adoption of plans and specifications (Secs. 25452, 25451); neither advertising for bids nor adoption of plans or specifications occurred in connection with this job.

The California cases construing this act are quite clear that not only is the contract void, but no recovery *in quantum meruit* is allowed.

Miller v. McKinnon, 20 C.2d 83, 124 P.2d 34, was a taxpayer's action to recover over 42,000.00 expended by Santa Clara County on repairing a rock quarry. The trial

court dismissed the action after sustaining a demurrer to the complaint on the ground that no action was stated. The Supreme Court reversed with directions to overrule the demurrer. The Court stated such contracts as are let without competitive bidding cannot be ratified, that no estoppel to deny their validity can be invoked against the County for entering into contracts without such bidding, that no recovery in quasi contract can be had pursuant to such contracts. The Court also pointed out that persons dealing with any public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. Extensive citations of authority to support these general propositions are found on page 88 of 20 C.2d and page 37 of 124 P.2d. The Court, in addition, stated that the job cannot be split into separate parts as a device for thwarting the public policy declared in the Government Code.

County of San Diego v. California Water and Telephone Company, 30 C.2d 817, 186 P.2d 124, was an action by a County against a utility company to enjoin the completion of a dam on which the company had already spent $800,000.00, because the work was causing a flooding of a county highway. The utility company alleged the county had abandoned the highway in question and had accepted an easement from the company for another location. The easement contained an agreement that the company would not be liable for flooding damage to the highway. The Court held the agreement was *ultra vires* and void. There was no estoppel. The Court stated that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation to protect the public.

These two cases have been cited with approval by the Supreme Court of this State as recently as 1956 in *City of Oakland v. Burns,* 46 C.2d 401, at page 405; 296 P.2d 333, at page 336, and by the appellate courts of this State as recently as February of 1958 in *Paterson v. Board of Trustees,* 157 C.A.2d 811, at pages 819, 820, and 821; 321 P.2d 825, at pages 829 and 830.

Nor can Mr. Warner, the Chairman of the Board of Supervisors acting as agent for the County, in signing the various contracts alleged in the Complaint, be held liable:

> "When an officer or public agent contracts in good faith with parties having knowledge of the extent of his authority or who have equal means of knowledge, *especially where the authority of the officer is prescribed by law,* he will not become individually responsible unless the intent to incur liability is clearly expressed, although it should be found that, through ignorance of the law, he may have exceeded his authority." (4 McQuillin, Municipal Corporations 163, Sec. 12.214.) (Emphasis added.)
>
> *Hancock v. Burns,* 158 A.C.A. 882, 888, 323 P.2d 456, 460;
>
> *Martelli v. Pollock,* 162 A.C.A. 701, 705, 328 P.2d 795, 797.

Mr. Warner's signature, furthermore, is not even as a County official alone: it is merely a clerical act evidencing the determination of the Board. A member of the Board of Supervisors is not liable in damages for his official acts, except as prescribed by statute.

> *Dawson v. Martin,* 150 C.A.2d 379, 382, 309 P.2d 915, 917.

3. Appellees' Disagreements With Appellant's "Statement of the Case."

Appellees agree generally with the "Statement of the Case" appearing in appellant's brief, pages 2 through 7, except for the descriptive terms used and legal conclusions drawn. A proper Statement of the Case should begin with the fact that the first event which occurred in connection with the work which is the subject of this case is the minute order of the Board of Supervisors of the appellee County dated August 28, 1956, which stated that the estimated cost of the work to be performed was $6,500.00 [Ex. E, R. 31]. Appellee, in its brief, describes this work as "eight separate work projects" (App. Br. p. 2) into which the total repair work was allegedly divided by the County officials (App. Br. p. 4). These "work projects" is a reference to the items listed on the requisition sent out by the County [App. Br. p. 5; R. 75, 77, 78, 83 and 84]. Thus, when appellant speaks in its brief in the "Statement of the Case" of "work projects," it is referring to the items which make up the total repair work.

Appellees disagree with the allegation in appellant's "Statement of the Case," at page 3 of its brief, that the Board's defense is that "the Board itself is guilty of statutory misfeasance." The fact more accurately stated is that there was a failure to adopt plans, specifications, strain sheets and work details and a failure to cause an advertisement for bids to be published, both as required by Sections 25450, 25451 and 25452 of the Government Code.

Appellees disagree with the statement that the repair work was "naturally and necessarily divided or separated by County officials" (App. Br. p. 4) and the reasons

therefor. The fact is there was no division or separation, but only an itemization of what constituted the total repair work. The reasons alleged are a conclusion of the appellant.

Appellees disagree with the statement of appellants that there was "competitive bidding" (App. Br. pp. 2, 5), as the uncontradicted affidavit of the Purchasing Agent, used to support appellee's motion on the judgment for pleadings, demonstrates, there was a mailing of some four or five forms for the receipt of bids, but "there was no advertising for bids for the performance of the work . . . and no plans, specifications, strain sheets, and working details for the work adopted by the Board of Supervisors . . ." [R. 55.]

4. Appellant's Citations Are Not in Point.

1. Page 18 of its brief:

Davis v. City of Santa Ana, 108 C.A.2d 669, 239 P.2d 656, and *Swarton v. Corby,* 38 C.A.2d 227, 100 P.2d 1077, were concerned with whether particular contracts were "public projects" or "public work," and decided the contracts before them—garbage collection and short wave radio installation, respectively—were *not.* In the instant case, we are concerned with a contract obviously within the governing statute—"the estimated cost of construction of any *public building* or the cost of any *repairs* thereto . . ." Government Code, Section 25450. Appellant has never contended this case is not based on a public work.

2. Page 19 of its brief:

Shelby v. Southern Pacific Co., 68 C.A.2d 594, 157 P.2d 442, 445, deals with a tort case, whether stopping a railroad crossing is enumerated in the Code.

Both *Garcelon's Estate,* 104 C. 570, 38 P. 414, and *Andrews v. Horton,* 8 C.A.2d 40, 47 P.2d 496, dealt with contracts in which the Court decided the public had no interest.

3. Pages 21 and 22 of its brief:

Gunnison County v. E. H. Rollins & Sons, 173 U.S. 255, 19 S.Ct. 390, 43 L.Ed. 689, a Colorado case, held that a bona fide holder of bonds which recited compliance with the state law that a certain amount of indebtedness could not be exceeded, but which was exceeded, could still collect. The reasoning of the Court was that the law gave the power to the County commissioners to determine whether the debt had been exceeded and therefore the bona fide holder could not determine that for himself, but had to rely on the statement in the bond.

Eyer Co. v. Mercer County, 292 Fed. 292, 1 F.2d 609, a Kentucky case, held that, as in the *Gunnison County* case, a County which promised a certain indebtedness was not exceeded, when it alone knew the facts, was estopped from denying the fact the indebtedness was exceeded as against a holder of a note.

These cases are to be distinguished from the case at bar where the appellant knew as well as the County that no plans or specifications or strain sheets had been adopted, and knew as well as the County that no newspaper advertisement for bids had taken place. The test set forth in the *Eyer* case itself is, at page 294, whether the individual dealing with the government, can have a "ready ascertainment of the truth in regard to the matter covered by the recital."

Miller v. McKinnon, 20 C.2d 83, 124 P.2d 34, has been briefed *supra* and does *not* stand for the proposition set

out on page 22 of appellant's brief. The Supreme Court of this State expressly stated in that decision, at page 88 of 20 C.2d and page 37 of 124 P.2d, that there would *not* be recovery on implied contract. Such recovery would be a transparent violation of the Government Code prohibition which renders the contract *void.*

4. Page 23 of its brief:

Gamewell Co. v. City of Phoenix, 216 F.2d 928 (C.A. 9, 1954), did *not* allow the contract therein to be enforced against the defendant. There was, it is true, a denial of the right of the defendant to recover payments from the plaintiff, and the trial judge here, who wrote the Court of Appeals decision there, said frankly in his judgment here that "were we free to follow our own ideas" that recovery would be allowed [R. 16], but, of course, "this being a diversity case, we are bound to follow California law and policy which prohibits recovery under any theory." [R. 160.]

McCormick Lumber Co. v. Highland School District, 26 C.A. 641, 147 P. 1183, was decided upon facts showing "irregularities occurring in the matter of the notices calling the meeting of the electors and asking for the submission of bids," but not, as here, a total failure of advertising. The Supreme Court, in the *Miller* case, at page 90, of 20 C.2d, and pages 38-39 of 124 P.2d, said that the *McCormick* case "involved a situation where *there was a compliance with the statutory requirements* but they were merely insufficient." (Emphasis added.) As the Court there went on, describing the *Miller* situation, but which language is appropriate to the case at bar: "Under the complaint here involved no advertisement for bids was made in proper form, defective form, or any form."

City Street Improvement Co. v. Kroh, 158 C. 308, 110 P. 933, does *not* hold that plans or "working details" are dispensable altogether, but only that a report of a highway commission need not go into detail and that some "slight or reasonable departure therefrom in the final specifications" (page 315 of 158 C., and page 937 of 110 P.) was not fatal to a contract subsequently let.

5. Page 24 of its brief:

Bear River Sand & Gravel Co. v. Placer County, 118 C.A.2d 684, 258 P.2d 543, holding *against* recovery by the plaintiff-contractor, points out, at page 689 of 118 C.A.2d, and page 546 of 258 P.2d: "The road commissioner [defendant] was without power to negotiate such a sale [purchase of crushed rock], and *so was the board of supervisors without advertising for bids.*" The Court then cites a number of cases, including *Miller v. McKinnon,* and proceeds, still at pages 689 and 546, respectively: "When the power of a board or public officer is limited to a prescribed method of contracting, the mode prescribed becomes the measure of the power. If the prescribed mode is disregarded, the contract is void and unenforceable." The Court held that the road commissioner was *not* an agent of the County, his acts could *not* be ratified by the Board of Supervisors, and the Court discussed the question of public officials as agents, at pages 690 and 546, respectively:—the words are appropriate here regarding Mr. Warner—

> "One who deals with a public officer stands charged presumptively with a full knowledge of that officer's powers and is bound at his peril to ascertain the extent of his power to bind the government of which he is an officer, and any act of an officer to be valid must find express authority in the law or be neces-

> sarily incidental to a power expressly granted . . . No government, whether state or local, is bound to any extent by an officer acting in excess of his authority even though it has received substantial benefits deriving from the *ultra vires* act. . . . Since [the] road commissioner was not authorized by any provision of the law to purchase materials of any character for use on the county roads, the county of Placer could not be bound."

The sustaining of the demurrer to the count of the complaint against the commissioner himself, "framed upon the theory that the road commissioner warranted himself to be an agent of the county" (pp. 684 and 544, respectively), was likewise affirmed on the appeal.

5. Statement Regarding the Record.

Appellant has stated that the printing of its earlier pleadings—the first two complaints and attendant papers—was unnecessary (App. Br. pp. 14-15), although appellant adopts portions of the "excessive designations" in its own brief (at pp. 15 and 27).

Our answer to this charge is as follows:

The appellant's brief is lengthy, confusing, and contradictory in theory, and ti is theerfore difficult to answer the various contentions. The appellant's method of procedure in the District Court was likewise lengthy, confusing, and contradictory and, therefore, in order to preserve the record for whatever theory appellant might adopt on appeal, these appellees-defendants were constrained to request the printing in the record of the various complaints made in the District Court. For example, it is confusing to know whether appellant seriously contends that there were various agreements which were entirely separate

from each other or whether there were three agreements each embodying elements of the other: in its first complaint at Paragraph IV appellant alleged "three agreements" [R. 4] and in the second complaint appellant pleaded "three separate agreements" [R. 37] by which the defendant agreed to pay the plaintiff "separately" in various "projects or orders respectively." [R. 37.]

As another example, appellant has deliberately shifted the emphasis from the original estimate of $6,500.00. In its first complaint, Paragraph IV(5), appellant mentioned the original $6,500.00 "estimate, pursuant to the aforesaid authorizations from the Board of Supervisors dated August 28, 1956, and November 7, 1956" [R. 7], and attached as an exhibit to the first complaint the Minute Order of the Board of Supervisors of that August 28, 1956, meeting which specifically stated that the *estimated* cost of the repair of the tank was $6,500.00. [Ex. E; R. 31.] Appellant deliberately omitted this from the first and second amended complaints and has attempted to gloss over this fact in its brief with only one oblique reference, at page 6 of the brief, where it is pointed out that the final sum of $7,511.60 was over the $6,500.00 authorization.

Again, in its first complaint appellant had as part of its argument that the County required itemization of the amounts [Par. VIII; R. 9], which is an obvious reference to defendants' suggestion that the plaintiff bill the County under the emergency repair provision of the Government Code, Section 25458, which allows payment without competitive bidding but which necessitates itemization of costs to plaintiff of materials, supplies and labor. This paragraph was omitted in later versions of appellant's story.

It was in the first amended complaint wherein appellant first argued that there was "actual competitive bidding on

invitations for bids" [R. 44], an allegation omitted from the first complaint, yet this new allegation appears in the same paragraph with appellant's position that the "various work projects involved in said contracts were not required to be so advertised." [R. 44.] The first complaint prayed for attorneys' fees [R. 11] and whether plaintiff must itemize costs [R. 11], was omitted from the later versions. [R. 45, 47.]

Thus it is this welter of confusion on the part of the appellant which compelled the defendants to request that all versions of appellant's story in the District Court be available for reference for this Honorable Court. The confusion is contained in appellant's opening brief: there is confusion as to whether there was one job or a series of projects of separate contracts; there is confusion as to whether there was actual competitive bidding or not and there is confusion as to how much was involved in the contract or series of contracts.

The majority of appellant's authorities are immaterial: its argument concerning splitting of public works in smaller counties of less than 500,000 population is in the first place wrong, because it is allowing a fictitious splitting in order to avoid the express prohibitions of the preceding sections, which never could have been intended by the Legislature, and in the second place is irrelevant to this case since there was no splitting here. As the trial court stated in this case, "the Plaintiffs themselves treated the contract as a whole. The mechanics lien executed by them on February 4, 1957, and recorded in the records of Orange County of February 7, 1957, recited: '. . . that the amount due claimant and unpaid *on account of said contract . . .*'". (Emphasis in the Court's opinion.) [R. 158-159.]

6. Conclusion.

We believe the facts themselves are clear and that defendants' position has been clear from the commencement of this action. It is simply that the Government Code renders *void* any contract let in violation of its provisions if the *estimated cost* of the job is in excess of $4,000.00. There was no adoption of plans and specifications and there was no advertising for bids. The plaintiff-appellant can talk on and on about various work "projects", various contracts, various representations, various minute orders of the Board, various invitations to bid, various "competitive bids," various figures in the various contracts. But the appellant can never change the facts that:

1. The job was estimated to be over $4,000.00, to-wit: $6,500.00;

2. There was no advertising for bids in a newspaper, nor any adoption of plans and specifications;

3. The Government Code therefore renders the contract void.

Prayer.

Appellees County of Orange and Willis H. Warner, Chairman of its Board of Supervisors, respectfully pray that the judgment be affirmed.

Respectfully submitted,

JOEL E. OGLE,
County Counsel,

STEPHEN K. TAMURA,
Assistant County Counsel,

and

ADRIAN KUYPER,
Assistant County Counsel,

Attorneys for Appellees.